IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 6, 2006

RICHARD COBURN MERCER v. MARILYN LUCRETIA HADLEY

Appeal from the Circuit Court for Hamilton County
No. 98D2167 Samuel H. Payne, Judge

No. E2006-00900-COA-R3-CV - FILED JUNE 20, 2007

This is a post-divorce case. Richard Coburn Mercer ("Husband") filed a petition seeking a reduction in his alimony obligation to his former spouse, Marilyn Lucretia Hadley ("Wife"). She filed a counterclaim seeking a judgment for an alimony arrearage. She also sought other relief. The trial court denied Husband's petition and awarded Wife an arrearage of $2,000. Wife appeals, asserting that the trial court erred (1) in allowing Husband a $6,000 credit against his $7,975 alimony arrearage; (2) in failing to decree that she was entitled to an equitable division of an employment severance package that Husband started receiving shortly after the parties' divorce; and (3) in the taxing of a special master's fee and in failing to tax Husband with the cost of a transcript of the hearing before the master. Husband, on the other hand, argues that the trial court erred in awarding Wife a $1,500 attorney's fee. He also seeks damages for a frivolous appeal. We modify in part, reverse in part, and affirm in part. We reject Husband's contention that Wife's appeal is frivolous in nature.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Modified in Part, Reversed in Part, and Affirmed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Marilyn Lucretia Hadley, appellant, pro se.

Mark G. Rothberger, Chattanooga, Tennessee, for the appellee, Richard Coburn Mercer.

OPINION

I.

The parties were divorced in April 1999, after a marriage of 22 years. For a period of 15 years immediately preceding the parties' divorce, Husband worked for the Nabisco Corporation. His

annual salary at the time of the divorce was $109,000. Wife, who had attended college, had not worked outside the home since the birth of the parties' first child in 1981.

In December 1998, shortly before the parties' divorce, Husband was notified by Nabisco that his employment would be terminated in four months. Husband informed Wife of his impending termination. He also told her that, as a part of his termination, he would receive a severance package that included six months of regular pay, four weeks of vacation pay, and a $2,500 "incentive pay[ment]." The severance package was valued at approximately $58,000.

Husband's last day at Nabisco was May 14, 1999. He immediately began drawing his severance pay. He received monthly payments from his severance package up until November 1999. In the month of his termination from Nabisco, Husband went to work for Brach's Confection Company.

The parties' judgment of divorce was entered on April 23, 1999. The court granted the parties a divorce based upon irreconcilable differences and incorporated into its judgment the parties' marital dissolution agreement ("the MDA"). The MDA was drafted by Husband. It was executed by the parties in the April 15-16, 1999, time frame. With respect to alimony, the MDA recites the following:

> Alimony. The Husband agrees to pay to the Wife alimony in the amount of One Thousand Five Hundred Dollars ($1,500.00) per month to be paid through automatic transfer of funds on the 1st and 16th of each month, beginning on the date of the Final Decree of Divorce and continuing through October, 2019, pursuant to the following conditions:
>
> | Husband's Personal Monthly Gross Income | Alimony Obligation |
> |---|---|
> | Over $7,500 | $1,500 |
> | $5,000 - $7,500 | 20% of gross income |
> | $2,000 - $5,000 | 10% of gross income |
> | Under $2,000 | -0- |
>
> * * *
>
> The amount of alimony paid by the Husband shall be reduced based upon the Wife's personal income (exclusive of alimony);
>
> | Wife's Personal Monthly Gross Income | Alimony Obligation |
> |---|---|
> | Under $2,000 | 100% of above |
> | $2,000 - $3,333 | 75% |
> | Over $3,333 - $5,000 | 50% of above |
> | Over $5,000 | -0- |

> One-time (lump sum) personal income for both parties (i.e., bonuses, severance packages, etc.) shall be pro-rated over the following twelve months in computing monthly earnings. . . .

There is in the record a document dated April 11, 1999. As can be seen, this document is dated some four days before the MDA was executed. The April 11, 1999, document is very brief:

> If Rich [Mercer] has employment income from a new position during the time he also is receiving severance and vacation pay from Nabisco, he will pay Marilyn [Mercer] $1,000 per month, after taxes, for this time period. Total not to exceed $6,000.

Wife testified that she composed the first sentence of the April 11, 1999, document and that Husband added the language "[t]otal not to exceed $6,000." Husband's signature is the only signature on the document.

Following the divorce, Husband made several payments to Wife over and above his regular monthly alimony payments of $1,500. These additional payments totaled $6,000, which, as can be seen, is the same amount as the "not to exceed" figure in the April 11, 1999, document. On at least one of his checks, Husband wrote the word "extra" in the memo portion of the check. Both parties treated the $6,000 as alimony on their 1999 tax returns.

Some two and a half years after the divorce, in September 2001, Husband filed a petition to reduce his alimony obligation, alleging as a material change in circumstances that he had lost his job and was forced to take another job at a reduced salary. Husband also alleged that, at the time of the divorce, the parties had contemplated that Wife would finish her college education and assume gainful employment. He alleged that, despite this understanding, Wife was still unemployed. Wife responded by denying that she had made such a commitment. She further noted that Husband's job loss occurred before the parties' divorce.

Husband later amended his petition to allege that Wife was receiving income from a third party who lived in her residence.

Wife filed a counterclaim, requesting, among other things, a judgment for an alimony arrearage. She claimed that Husband unilaterally reduced the amount of his alimony payments beginning in October 2001. The trial court appointed a Special Master and directed the Special Master (1) to determine Husband's alimony arrearage and (2) to address Husband's allegation regarding a third party living in Wife's residence.

At a hearing before the Special Master, Husband requested that he be allowed a credit against his alimony arrearage for the extra $6,000 paid by him during the six months immediately following the parties' divorce. The Special Master later filed a report that included the following pertinent findings:

> The $6,000.00 paid by [Husband] and received by [Wife] is alimony as it was based on additional income to be received by [Husband] and was reported on his tax return as alimony and was reporte[d] by [Wife] as taxable income on her tax return;
>
> The total arrearage of [Husband] incurred during the pendency of this action is the stipulated amount of $3,475.00 and the additional amount of $4,500.00 submitted by the parties at the conclusion of the Special Master hearing for a total arrearage of $7,975.00;

(Paragraph numbering in original omitted). As can be seen, the Special Master did not grant Husband a credit against his arrearage for the additional $6,000. Furthermore, the Special Master found that Husband's contention regarding a third party living in Wife's residence was not sustained by the proof.

The Special Master recommended that the costs associated with the proceeding before him, including his fee, be assessed against the parties equally. Wife filed a written objection to the Special Master's report, asserting, inter alia, that Husband intended the $6,000 to be a gift, rather than alimony. Wife also objected to being assessed any portion of the Special Master's fee and the cost of a transcript of the proceedings before the Special Master. She stated that Husband should be responsible for all of the costs "because he created them through his failure to comply with the marital dissolution agreement, his contempt . . . , and his efforts to contort his testimony and the facts in order to justify his desire to reduce alimony, AND his ongoing refusal to comply with reasonable discovery requests. . . ." (Capitalization in original).

The trial court entered an order awarding the Special Master a fee of $1,121.25. The order directed each party to pay half of the fee. Thereafter, the trial court entered an order expressly finding, contrary to the Special Master's implicit finding, that Husband was entitled to a $6,000 credit against the $7,975 alimony arrearage:

> The recommendation of the Special Master that the $6,000.00 payment by [Husband] to [Wife] be treated as an alimony payment is hereby confirmed by the Court and [Husband] shall be granted credit for alimony for the $6,000.00 payment by [Husband] to [Wife].
>
> The Court determines that after giving [Husband] credit for the $6,000.00, the balance remaining due as alimony arrearage as of September 28, 2004, is $2,000.00 and Judgment is hereby rendered for that amount as alimony in favor of [Wife] and against [Husband]; execution upon said Judgment is hereby stayed pending the payment by [Husband] to [Wife] of $100.00 per month in satisfaction of said Judgment.

(Paragraph numbering in original omitted). The court's order also dismissed Husband's petition to modify his alimony obligation. It also failed to assess any portion of the transcript cost to Husband.

In June 2004, Wife filed another counterclaim, asking the court (1) to modify the parties' MDA to include – as marital property – the severance package received by Husband from Nabisco; and (2) to award her half of the value of the severance package.

The trial court held a hearing in January 2006. The court dismissed Wife's counterclaim, stating the following:

> Well, you[,Wife,] knew about [the severance package]. You should have added it to [the MDA]. That's what I keep telling you. Y'all discussed that before you amended this darn thing. Y'all fouled it up. That's the reason it works better – I'm going to tell you, I've been here – this coming August, it'll be 32 years. I've never seen a formula [like] what y'all came up with. When I read it – I think I told you at the time that this thing is doomed to come back, y'all are going to be coming back unless y'all get together and agree, y'all will be paying lawyers from now on, because this thing is the most convoluted thing I've ever read. I've been here a long time, and I've never had one of these.
>
> * * *
>
> And I understand your frustration, but by the same token, I can't rewrite [the MDA] for you. . . .

Wife subsequently filed a motion to alter or amend the trial court's order and a motion for discretionary costs. In her motion for discretionary costs, she asked the court to assess Husband with all of the costs incurred in her defense of Husband's petition. The court awarded Wife attorney's fees of $1,500. In all other respects, the court denied Wife's motions. This appeal followed.

II.

We construe Wife's brief as raising the following questions on appeal:

> 1. Did the trial court err when it ruled that Husband was entitled to a credit against the alimony arrearage due under the MDA for the $6,000 paid by him pursuant to the April 11, 1999, document?
>
> 2. Did the trial court err in its decision regarding the Nabisco severance package?

3. Did the trial court abuse its discretion when it failed to order Husband to pay all of the Special Master's fee and when it failed to assess Husband with any portion of the cost of the transcript of the proceedings before the Special Master?

Husband raises two additional issues for our consideration. His issues present the following questions:

1. Did the trial court abuse its discretion when it ordered Husband to pay Wife an attorney's fee of $1,500?

2. Is Husband entitled to damages for a frivolous appeal?

III.

Except for concurrent findings by the Special Master and trial court, our standard of review in this non-jury case is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption of correctness as to the trial court's factual determinations – one that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Questions of law are reviewed by us *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. ***Union Planters Nat'l Bank v. American Home Assurance Co.***, 865 S.W.2d 907, 912 (Tenn. Ct. App. 1993).

IV.

A.

Wife's first issue on appeal is whether the trial court erred in granting Husband a $6,000 credit against the amount of the alimony arrearage due under the terms of the parties' MDA. Wife argues that Husband should not receive this credit because, according to her, he intended the $6,000 to be a gift. As an alternative argument, she contends that, even if the $6,000 is alimony rather than a gift, the parties intended it to be alimony *in addition to* Husband's spousal support obligation under the MDA. As we construe the critical issue before us, the pertinent questions before us are two in number: first, whether Husband intended the $6,000 to be a gift, and, second, if not, whether the parties intended the $6,000 to be in addition to, *or* in payment of, the alimony due under the MDA.

B.

In determining the appropriate treatment of Husband's combined payments totaling $6,000, the Special Master and the trial court both found that the $6,000 was alimony. In taking this approach, both implicitly found that the $6,000 was not a gift. This concurrent finding by the

Special Master and the trial court changes our typical standard of review as to factual determinations of a trial court:

> The Trial Court's order referring certain matters to the Special Master, the Special Master's Report, and the Trial Court's Order adopting the findings and conclusions of the Special Master affect our standard of review on appeal. A concurrent finding of a Special Master and a Trial Court is conclusive on appeal, except where it is upon an issue not proper to be referred, where it is based on an error of law or a mixed question of fact and law, or *where it is not supported by any material evidence.*

Manis v. Manis, 49 S.W.3d 295, 301 (Tenn. Ct. App. 2001) (emphasis added; citations omitted).

There is material evidence in the record to support the concurrent finding that the $6,000 is alimony and not a gift. Both of the parties reported the $6,000 as alimony on their respective federal income tax returns. Husband testified that he paid it to Wife because she was "getting her new house established and had expenses related to that," *i.e.*, because Wife had a need and it was one that Husband had the resources to meet. This is alimony language. At one point in his testimony, he specifically referred to the $6,000 as alimony. The bulk of Wife's testimony on the subject of the $6,000 was focused on the issue of whether these payments were in addition to, or rather in payment of, the alimony obligation set forth in the MDA. When we consider the entire record in this case, we hold that there is abundant material evidence to support the concurrent finding of alimony as opposed to a gift. However, it remains to be seen whether Husband is entitled to a credit for the $6,000 against the alimony due under the language of the MDA.

C.

The issue of whether the parties intended the $6,000 to be additional alimony or a payment on the alimony due under the MDA turns on the intention of the parties. This, in turn, causes us to focus on the interpretation of the April 11, 1999, document, the proper construction of the MDA, and the interplay, if any, between these two documents.

The overriding issue in contract interpretation is directed at determining the intention of the contracting parties. ***West v. Laminite Plastics Mfg. Co***., 674 S.W.2d 310, 313 (Tenn. Ct. App. 1984). Generally speaking, the interpretation of a written contract raises a question of law to be resolved by the court. ***Union Planters***, 865 S.W.2d at 912. Typically, that intent is to be gleaned from the "contract as written." ***Petty v. Sloan***, 277 S.W.2d 355, 358 (Tenn. 1955). However, when the meaning of a writing is ambiguous, "parol evidence is admissible to explain the actual agreement." ***Jones v. Brooks***, 696 S.W.2d 885, 886 (Tenn. 1985).

D.

The parties' MDA provides that "[t]he duties, rights, obligations and responsibilities of the parties are contained in [the MDA] and neither party shall have any further or additional obligation to the other party." It should be noted, however, that the MDA does not explicitly state that it supersedes any and all prior discussions/agreements between the parties nor does it explicitly refer, in any way, to the April 11, 1999, document. *See, e.g.,* ***Rentenbach Engineering Co. v. General Realty Ltd.***, 707 S.W.2d 524, 526 (Tenn. Ct. App. 1985). This lack of reference is curious, particularly in view of the fact that the April 11, 1999, document was signed a mere four days before the MDA was executed. It is important to recognize that the parties composed the two-sentence April 11, 1999, document and Husband drafted the MDA. While the well-recognized general rule is that the last agreement on a particular subject supersedes all former agreements, *see* ***Magnolia Group v. Metro. Dev. & Hous. Agency of Nashville***, 783 S.W.2d 563, 566 (Tenn. Ct. App. 1989), such a rule should not preclude further inquiry if there is doubt as to whether the rigid application of the rule will result in an observance of the true intention of the parties. *See* ***West***, 674 S.W.2d at 313.

When we consider the two relevant documents, we find ambiguity as to the intention of the parties. We are not persuaded that the language of the MDA – drafted by a layman – reflects the parties' intention to void the commitment undertaken by Husband in the April 11, 1999, document. While the MDA refers *generally* to "bonuses, severance packages, etc." that reference is only relevant, as a practical matter, in determining whether, going forward, Husband's monthly alimony obligation under the MDA should be automatically *reduced* in the future. It has nothing to do with potential increases in alimony; the maximum monthly alimony under the MDA is capped at $1,500, the amount of Husband's initial obligation. The April 11, 1999, document, on the other hand, refers to something that will *increase*, albeit for a short time, Husband's alimony obligation. We also are somewhat confused by the failure of the MDA to specifically refer to the April 11, 1999, document – one that was composed by the parties and signed by Husband only a few days before the MDA was executed. Because of the ambiguous nature of the interplay between the two documents, we find it appropriate to consider the testimony of the parties in performing our task of determining the true intent of the parties.

At the hearing on Husband's petition to reduce his alimony obligation, Husband gave the following testimony reflecting his understanding of the April 11, 1999, document:

> Q: After you-all were divorced in April of 1999 did you pay more than what you were obligated to pay her?
>
> A: In several ways, yes.
>
> Q: All right. Tell the Court about that?
>
> A: In October of 1999, I gave [Wife] an extra $6,000 because I had made so much money.

* * *

> Q: Why did you do that?
>
> A: Well, she was in the process of getting her new house established and had expenses related to that.

At the hearing before the Special Master, Husband stated that,

> [s]ince I was starting at Brach's, I was basically going to be receiving two paychecks. [Wife] was aware of that fact. That's when we drafted [the April 11, 1999] agreement, so that she could benefit from that extra money I was going to be making during that period of time.

Later, during the cross-examination of Husband, the following discussion unfolded:

> Q: I want to understand this. I want to make sure that it's very clear. In 1999 we have different possibilities. Either you gave [Wife] $6000 and did not intend it to be alimony, but for the purposes of the IRS, you wanted the benefit of it being treated as alimony. You got her to agree to that. Or it was alimony just like every other year . . . right?
>
> A: No. It was alimony above and beyond what we had in writing at that time.

* * *

> Q: The $6000 you paid her in 1999 beyond the alimony obligation –
>
> A: Beyond what was written by that formula [in the MDA], correct.
>
> Q: Which one of the following was it, extra alimony that you were paying in advance, payment made on what you thought was a moral obligation due under [the April 11, 1999 document], or was it money that you gave her because of her financial expenses coming from moving into the new house as you testified [previously]? Which one of those three would it be, because those are mutually exclusive, aren't they?
>
> A: Well, I don't know if they are or aren't. All I can say is that on April 11th when I agreed to pay her that money I had the means to do it and she had the needs regarding household formation. I thought it

was a reasonable thing to do. I had extra money and she had extra needs.

Now, that doesn't mean that it's a gift or that it's alimony. In my mind it was something I would be able to deduct from income. I had a lot of income, fortunately, that year, much more than other years.

During Wife's direct examination, she testified as follows:

Q: Was there ever any discussion that you had with your ex-husband regarding the $6000 payment that he made in 1999 which was in excess of his then current alimony obligations, which in 1999 indicated that he was intending it to be an advance payment on future alimony obligations?

A. No. That was creative I thought. What actually happened was that we wrote out the agreement. I have my –

Q: By agreement, I'm assuming you're talking about [the April 11, 1999 agreement].

A: Yes. The April 11th agreement. We'd been negotiating for our divorce for a period of two years. We had revisions going back and forth between our attorneys. These were the last ones. I had made a note at the time, the revisions were turned in on April 12, 1999.

We both had had enough of it, but obviously my ex-husband had definitely had enough of it. So we sent in these final revisions. We were both pretty happy with them. They're dated the 12th. Right at that same time we're still thinking about things. We're still talking about things.

I signed the MDA on April 15th, you know, but in the meantime I'm saying, well, what about this, what about this, and what about this. I'm asking about what I feel are loose odds and ends. He basically is going to be making $180,000 in 1999. It's not anywhere mentioned in the MDA that he is getting all that extra income that year. I said, well, we're not basing our child support on it that year and we're not basing alimony on it, we're not basing anything on it.

So it seemed fair to me, if he is making an extra $70,000 and I'm looking to buy a house and taking at least two of the kids with me, you know, then I would like a little bit of it if we're not going to deal with it in court. He didn't want to postpone things by dealing with it

> in court. So I said, fine, we'll just make a little agreement on the side and we'll sign it and I did so in good faith.
>
> If he had any other intention at the time to later defraud me, basically try to defraud me out of the money, certainly I would have talked to my attorney. He didn't want to get attorneys involved, which is why we signed. . . .

Several things "jump out" from this testimony. First, Husband does not attempt to claim that the MDA destroyed his commitment set forth in the April 11, 1999, document. Second, Husband acknowledges, in response to a question, that the $6,000 was "extra" and was "more than what [he was] obligated to pay [Wife]." Third, Husband testified that the April 11, 1999, document was drafted "so [Wife] could benefit from that extra money [Husband] was going to be making." It is also important to note Husband's testimony that the $6,000 "was alimony above and beyond what we had in writing at that time." This latter reference is to the MDA. This testimony and the testimony of Wife shows that the parties intended that the April 11, 1999, commitment of Husband would survive and be in addition to the alimony due under the provisions of the MDA. This is what the parties agreed to and what we are duty-bound to enforce. Accordingly, we modify the trial court's alimony arrearage award by increasing it from $2,000 to $7,975.[1]

V.

Next, Wife contends that the trial court erred in dismissing her counterclaim to modify the parties' MDA to include an equal division of the severance package Husband received from Nabisco. Wife argues that, because the severance package stemmed from employment that Husband had during the parties' marriage, it should have been listed as marital property in the MDA and equitably divided between the parties. She further asserts that, by not listing the severance package as a marital asset, Husband breached the provision of the MDA providing that both parties had made a full and complete disclosure of their assets and that "each of the parties represents that they own no real or personal property which is not described or referred to in this Agreement. . . ." We disagree with Wife's position on this matter.

Wife was well aware of Husband's severance package at the time the MDA was executed. She also knew that if Husband got a new job during the period of time he was receiving the benefit of the Nabisco severance package – which he did – that she would benefit financially from Husband's dual incomes. As it turned out, she did so benefit. Since, as we have determined, the parties intended that the April 11, 1999, commitment of Husband was in addition to the alimony provisions of the MDA, it would be grossly unfair to Husband to hold that the severance package should, in effect, be divided a second time. This issue is found adverse to Wife.

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[1] The trial court appears to have confirmed the Special Master's finding as to the gross alimony arrearage under the MDA but, apparently by oversight, the court rounded the $7,975 figure up to $8,000.

VI.

Wife's final issue is whether the trial court erred in denying her attempt to hold Husband responsible for the entire fee of the Special Master. She also contends that the court erred in failing to tax Husband with any portion of the cost of the transcript of the hearing before the Special Master.[2] To support her argument that Husband should be responsible for these costs, Wife asserts that

> [b]ecause [Husband]'s Petition to Modify was denied, because the Special Master was only needed due to [Husband]'s actions, because [Husband] refused to provide requested financial records even after an Order was entered that he do so, because [Wife]'s financial information was found to be accurate and used by the Court to determine arrearage, because the Trial Court determined that [Wife] had received no income from a third party, because the Trial Court found that [Husband] was still in arrearage in support payments by $2,000 (even after giving him credit for the extra $6,000), because [Husband] caused delay and increased costs associated with extended litigation due to his late claims (brought in after the Court hearing that determined the fate of his Petition to Modify in October 2002), [Wife] believes that her request for some of her more significant discretionary expenses related **only** to defending herself against [Husband]'s Petition to Modify was well-taken . . . .

(Bold print in original).

Decisions regarding the taxing of costs are generally within the trial court's discretion, and appellate courts are disinclined to interfere with a trial court's decision unless the court has abused its discretion. *See* T.C.A. § 20-12-119 (1994)[3]; ***Rogers v. Russell***, 733 S.W.2d 79, 88 (Tenn. Ct.

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[2] In addition to these two costs, Wife requests that Husband also be assessed "other discretionary costs." In her brief, she states that one-half of the Special Master's fee, the cost of the transcript of the Special Master hearing, and these "other discretionary costs" amount to a total of $1,579.25. The record, however, does not include the "Verified Bill of Costs" filed by Wife in this case. Therefore, we are not certain as to what "other discretionary costs" Wife is seeking. Hence, our decision in this case is limited to the Special Master's fee and the transcript cost. The additional costs, if any, should be minimal in amount. In any event, because Wife has not established what those other costs are, they will be her responsibility.

[3] T.C.A. § 20-12-119 provides the following:

> (a) In all civil cases, whether tried by a jury or before the court without a jury, the presiding judge shall have a right to adjudge the cost.
>
> (b) In doing so, the presiding judge shall be authorized, in the presiding judge's

(continued...)

App. 1986). However, in the instant case, Wife's position with respect to the alimony arrearage was totally vindicated by the Special Master's recommendation, while Husband's attempt to modify his alimony obligation was totally rejected by the Special Master. Accordingly, we agree with Wife that the need for the Special Master and the cost of the transcript of that hearing were caused by Husband's failure to do that which he was obligated to do by virtue of his undertakings set forth in the April 11, 1999, document and the MDA. We hold that the trial court abused its discretion in taxing the Special Master's fee equally against the parties and by failing to charge Husband with any of the cost of the transcript. That decision is reversed, and Husband is hereby ordered to pay the entire amount of the Special Master's fee and the cost of the transcript.

VII.

Husband raises the additional issue of whether the trial court erred in awarding Wife $1,500 in attorney's fees.

In making this award to Wife, the trial court stated the following:

> The original Petition to Modify filed by [Husband] was dismissed and costs adjudged against [Husband] by Order entered on October 18, 2004. In the answer and counter-petition [Wife] asked for attorney's fees in the amount of $1,500.00. At this time [Wife] was unemployed. The Court overlooked the petition of [Wife] for attorney's fees and the Final Order entered on October 18, 2004 is hereby amended to reflect that [Husband] is to pay [Wife] $1,500.00 for her attorney's fees.

A trial court has broad discretion on the subject of attorney's fees in a post-divorce proceeding. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 751 (Tenn. 2002). Considering the relevant factors in T.C.A. § 36-5-121(I) (2005), we find no abuse of discretion in the trial court's award of fees in this case.

VIII.

In view of the fact that Wife has been substantially successful on this appeal, it would be incongruous for us to find Wife's appeal frivolous. On the contrary, her appeal has merit as we have determined in this opinion.

IX.

The judgment of the trial court is modified so as to provide that the alimony arrearage due Wife is $7,975. The judgment of the trial court regarding the taxing of the Special Master's fee and

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[3](...continued)

> discretion, to apportion the cost between the litigants, as in the presiding judge's opinion the equities of the case demand.

the cost of the transcript of the hearing before the Special Master is reversed and Husband is hereby ordered to pay all of the fee and transcript cost. The remainder of the trial court judgment is affirmed. Because we have increased the alimony arrearage award from $2,000 to $7,975, we remand to the trial court for the purpose of establishing a new repayment plan. In doing so, we hold that, in view of the larger award, repayment at the rate of $100 per month is not sufficient. Costs on appeal are taxed to the appellee, Richard Coburn Mercer.

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CHARLES D. SUSANO, JR., JUDGE